IN THE HIGH COURTUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1038 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PRAKASH KANTIBHAI VASAVA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1,MR DEEPAK M SHAH for Appellant(s) : 1,MS SADHANA SAGAR for Appellant(s) : 1,
MR PD BHATE APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 13/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA)

1. This appeal is preferred by the appellant

under Section 374 (2) of the Code of Criminal Procedure, 1973 and challenged the judgment dated 5-11-1998 rendered by the learned Addl. Sessions Judge, Ahmedabad (Rural), Mirzapur, Ahmedabad in Sessions Case No. 93 of 1996 whereby he is convicted for the offence punishable under Section 302 of the I.P. Code and u/s 135 of the Bombay Police Act and sentenced to undergo life imprisonment and pay fine of Rs.500/-,in default thereof, to undergo simple imprisonment of three months for the offence punishable under Section 302 of the I.P. Code. No separate sentence has been awarded to the appellant for the offence punishable u/s 135 of the Bombay Police Act.

2. The facts, in brief, emerging from the prosecution case are that appellant – accused Prakash Kantilal was the friend of co-accused Rajesh Shamsingh Vasava who was staying at village Andhari with his father co-accused Shamsingh Keshav Vasava. Before about a year of the incident cousin uncle of the complainant Himmatsingh Khumansingh beat Maniben wife of co-accused Shamsingh and therefore they were not speaking with each other on account of such dispute. On 19-4-1996 at about 11-00 p.m. when the complainant, Ajit Virsingh and Jashvant Viram Vasava were sitting on 'otla' of his courtyard Himmatsingh Khumansinh came out to feed the cattle. At that time on 19-4-1996 at about 23-00 hours at night the appellant and other co-accused Shamsingh Keshav Vasava and Rajeshbhai

Shamsingh Vasava came there abusing and attacked Himmatsingh Khumansingh. The complainant, Ajit Virsingh and Jashvant Viram tried to rescue. Appellant accused Prakash Kanti had spear, co-accused Shamsingh Keshav had stick and co-accused Rajesh had knife. All of them had inflicted fatal injury on right side of Himmatsingh. On account of shouting Bhagwan Jiva, grand mother of complainant Premilaben and his brother Navin came there and so all of them ran away with weapons.

3. On the basis of the complaint filed by Jayesh Mansinghbhai on 20-4-1996, offence was registered as I – CR No. 1523 of 1996 at Dholka Police Station and investigation was started. During the course of the investigation, the accused were arrested. The statements of the witnesses were recorded and panchanama of scene of offence as well as inquest panchanama of dead body of the deceased were drawn and the dead body of the deceased was sent for postmortem examination. Muddamal weapons used in the commission of the offence were discovered by drawing discovery panchanama. The muddamal articles were sent to F.S.L. for examination.

4. On completion of the investigation, charge sheet was laid before the Judicial Magistrate, First Class, Dholka against the accused for the offence punishable u/s 302 of the I.P. Code and under Section 135 of the Bombay Police Act. As offence punishable u/s 302 of the I.P. Code was exclusively triable by the Court

of Sessions, the case was committed to the Sessions Court, Ahmedabad (Rural), Mirzapur, Ahmedabad and it was registered as Sessions Case No. 93 of 1996. Learned Additional Sessions Judge, Ahmedabad (Rural), Mirzapur, Ahmedabad framed charge at Exh. 2 against the accused for the offence punishable u/s 302, 504, 114 of the I.P. Code and under Section 135 of the Bombay Police Act. The accused pleaded not guilty to the charge and claimed to be tried. On completion of recording of evidence by prosecution, the learned trial Judge explained to the accused the incriminating circumstances appearing against them in the evidence and recorded their further statement u/s 313 of the Code of Criminal Procedure, 1973, wherein the accused stated that false case is foisted upon them. The accused examined one witness.

5. The accused examined D.W. 1 Raijibhai Atuji at Exh. 56. The witness produced complaint dated 10-1-1998 filed by one Pratapbhai Bhailalbhai Vasava against Jayeshbhai Sureshbhai, Rajeshbhai Shimantbhai, Ajit Virsing and Nimesh Virsing for the offence punishable u/s 323 – 324 of the I.P Code.

6. After hearing the oral submissions made by the learned counsel for the parties, the learned trial Judge has come to the conclusion that the prosecution has proved the charges framed against the appellant- original accused No.2 for the offence punishable u/s 302 of the I.P. Code and u/s 135 of

the Bombay Police Act and sentenced him to undergo life imprisonment and pay fine as stated hereinabove. The trial Court also convicted other co-accused Rajesh Shamsingh Vasava for the offence punishable u/s 323 of the I.P. Code and sentenced him to undergo rigorous imprisonment of one year and pay fine of Rs.500/-, in default thereof, to undergo rigorous imprisonment of two months. No separate sentence was awarded to them for the offence punishable u/s 135 of the Bombay Police Act. Co-accused Shamsingh Keshav was acquitted. Therefore, the appellant – accused Prakashbhai Kantibhai has preferred the present appeal and challenged the said judgment.

7. We would like to clarify here that at some places in the depositions of the witnesses the name of accused No. 1 is referred as Shamsingh as well as Ramsingh. Therefore, in order to avoid ambiguity in this judgment the name of accused No.1 is mentioned as “Shamsingh”.

8. We have heard learned advocate Ms. Sadhana Sagar for the appellant and learned A.P.P. Mr. P.D. Bhate for the respondent – State at length and in great detail.

9. Learned advocate Ms. Sadhana Sagar mainly contended that the prosecution has examined only interested witnesses whose depositions cannot be relied upon for recording the conviction. She also

submitted that in the F.I.R. it is alleged that all three accused attacked the deceased. However, no specific and individual role is attributed to the accused. Whereas in the deposition the witnesses have attributed separate role. This is an improvement and therefore oral version of the witnesses cannot be relied upon. She also submitted that muddamal spear was sent to the F.S.L. for examination and F.S.L. Report does indicate blood group of the deceased on the muddamal spear and no blood stains were found on the clothes of the appellant and therefore involvement of the appellant in commission of the offense becomes doubtful. She also submitted that the place of offense has been changed and hence it raises doubt about occurrence of the incident. In view of these discrepancies in the prosecution case, the benefit of doubt should be given to the appellant. In the alternative she submitted that if the court believes that the appellant is not entitled to the benefit of doubt, then looking to the young age of the appellant, conviction awarded for the offense of murder of the deceased punishable u/s 302 of the I.P. Code be converted in the conviction under Section 304 part I or Part-II of the I.P. Code.

10. Learned A.P.P. Mr. P.D. Bhate, for the respondent – State submitted that the prosecution has proved the case beyond reasonable doubt against the appellant by adducing cogent and reliable evidence. Independent witnesses are also examined by the

prosecution in support of its case. He also submitted that the medical evidence indicates that the injuries were caused to the vital part of the body of the deceased and the medical evidence indicates that the deceased died on account of the injuries inflicted by the appellant. Therefore, the prosecution has proved the charges leveled against the appellant. He submitted that simply because the appellant is a young boy, conviction cannot be altered. Therefore, no interference is warranted in the judgment and order of conviction passed by the trial Judge and the appeal requires to be dismissed.

11. We have considered the rival submissions and have gone through the judgment and the Record and Proceedings of the trial court.

12. In order to prove the case against the appellant, the prosecution examined P.W. 10 Dr. Chhatrasingh Vajesingh Barad at Eh. 42. In his oral deposition the witness deposed that he had found the following external as well as internal injuries on the dead body of deceased Himmatsingh Khumansingh.

External injuries :

i. Contused lacerated wound on left forehead 1/2″ x ¼ “ x muscle deep.

ii. Abrasion on left elbow joint posteriorly.

iii. Incised stab would on right side – chest wall, anterior auxiliary line between 6th & 7th rib 1 1/2″ x 1/2″ x 4″ directed.

Internal injuries :

i. Right lobe penetrated corresponding to ext. wound ext. shown in Column NO.17 No.(3), where right lobe is penetrated by cutting weapon. Blood clots in right cavity.

13. The witness further deposed that external injury No.3 found on the dead body of the deceased was possible by muddamal spear and such injury was sufficient in the ordinary course of nature to cause the death. The defense has not been able to elicit anything from cross-examination of the witness. It appears from the postmortem note Exh. 43 that the internal injury was corresponding to external injury No.3. According to the doctor such injury was sufficient in the ordinary course of nature to cause death. The P.M. Note also indicates that cause of death was due to shock caused by bleeding from injured liver caused by sharp cutting instrument. It also appears from the medical evidence that the injury was caused on the vital part of the deceased and such injury was possible by muddamal spear. In view of this medical evidence, it is clear that the death of the deceased was homicidal in nature.

14. The prosecution also examined complainant P.W. 1 Jayeshbhai Mansingbhai Vasava at Exh.11 who had given first information about the incident. The witness deposed that deceased Himmatsinh Khumansinh had quarrel with Shamsingh Keshav Vasava before about one year of the incident and on account of the quarrel, they were not on speaking terms. The witness also deposed that the incident occurred on 19-4-1996 at about 11-00 O'clock at night; that he, Ajitsing Virsing Vasava and Jashwantbhai Virambhai Vasava were sitting on “otla” in the court-yard, at that time, Rajesh Shamsingh Vasava, Shamsingh Keshav and Prakash Kanti came there abusing and inflicted fatal injury to deceased Himmatsinh. The witness also deposed that Rajesh Shamsingh had knife, Prakash Kantibhai had spear and Shamsingh Keshav had stick in their hand. The witness further deposed that Himmatsingh caught the stick as Rajesh Shamsingh Vasava tried to give stick blow thereafter as Himmatsinh fell down Prakash Kantibhai gave spear blow on his right side. There is no cross-examination of this witness with regard to the role attributed by the appellant except the cross-examination with regard to topography of the scene of offence. In the cross-examination, the witness deposed that the deceased was beaten after feeding the cattle. The witness also denied that as the deceased was drunk, he fell down and a spike in the cattle-shed hit on his right side. It appears from the trend of cross-examination that the accused tried to establish that the deceased was dragged

from the place of occurrence to some other place. However, from the cross-examination of the witness it does not appear that the victim was dragged from the place of the incident. In view of this evidence, in our view, the defence has not been able to elicit that the deceased was dragged from the place of incident and the witness is not telling the truth and is falsely implicating the accused as the deceased was related to him.

15. The complaint Exh. 13 filed by P.W. 1 Jayeshbhai Mansingbhai Vasava gives detailed description of the incident. It indicates the type of the weapons used by the accused and the nature of the injuries caused to the deceased. It also discloses the motive behind the incident. It appears that the incident occurred at around 11-00 p.m. hours on 19-4-1996 and the complaint was lodged at 1-00 a.m. on 20-4-1996. But the complainant has explained the delay in filing the complaint by stating in his deposition that vehicle was not available to go to police station at Dholka and therefore he had to go to the police station on cycle. This explanation is not challenged by the accused in cross-examination. It appears that immediately within 2 hours of the incident information about the incident is given to the police station. Such delay cannot be considered as delay is fatal to the prosecution. Therefore, in our view, immediately after occurrence of the incident, without any delay the complaint has been

filed giving details about the incident and involvement of the accused in the offence.

16. The prosecution also examined P.W. 2 Ajitbhai Virsingbhai Exh. 18 who is also an eye witness. He deposed that the incident occurred at 11-00 p.m. on 19-4-1996, when he, Jashvant and Jayesh were sitting on 'otla'. He also deposed that Himmatsingh came out of the house to feed the cattle, the accused came abusing and attacked Himmatsingh, that Shamsingh had stick, Prakash Kantilal had spear and Rajesh had knife in his hand. He further deposed that Shamsingh gave stick blow on shoulder; that as Himmatsingh fell down Prakash inflicted spear blow on right side and Shamsingh inflicted knife blow above eye. The witness is extensively cross-examined but nothing material is elicited. The defence has not been able to create any doubt about the presence or trust worthiness of this witness. The witness has given details about the incident and the role attributed by the accused. Cross-examination of the witness does not indicate that the witness was not present at the time of incident and has been supporting the prosecution case only because the witness is related to the victim.

17. The prosecution also examined P.W. 4 Navinbhai Mansingbhai at Exh. 23 who has also given detailed description with regard to occurrence of the incident. He deposed that on account of shouting he came out of his house and saw that Prakash had

spear, Rajesh had knife and Shamsingh had stick and the scuffle was going on. He also deposed that Prakash gave spear blow on right side of Himmatsingh. In the cross-examination the witness denied that when he came out of the house he saw Himmatsingh bleeding and also denied that he was not present at the time of incident and was at Ankleshwar. In view of this evidence, it is difficult to believe that the witness was not present at the time of incident. The defence has not been able to raise suspicion about the presence of the witness. Now on analysing the oral depositions of all the three witnesses it appears that all these three witnesses are related to deceased Himmatsingh Khumansinh. But these three witnesses are distant relatives of the deceased. In our view, only because of distant relation nobody would falsely implicate any person in the offence. It is also required to be noted that the appellant had no dispute or quarrel with the deceased but co-accused Shamsingh Keshav Vasava had quarrel with the deceased. Therefore, it is difficult to believe that the witnesses are falsely implicating the appellant in the offence.

18. The prosecution also examined P.W. 9 Jashvantbhai Virambhai at Exh. 40. The witness was sitting on 'otla' with other eye witnesses; P.W. 1 Jayeshbhai and P.W. 2 Ajitbhai at the time of incident. The witness deposed that the accused came abusing Himmatsingh and Shamsingh gave stick blow, Rajesh gave knife blow on left eye and Prakash gave

spear blow on right side. In the cross-examination, the witness deposed that spear blow was given with force and it was towards downward direction. In view of this evidence, it appears that the appellant with other co-accused came at the place of incident and the appellant gave spear blow with full force which caused fatal injury to the victim. The defence has not been able to demonstrate that the presence of this witness is not possible and witness is falsely implicating the appellant. On overall appreciation of evidence of this witness, it appears that he has supported the prosecution case in all respect. It appears from the deposition of the witness that he is either related to the other eye witnesses or to the deceased. Therefore, it would be difficult to believe that the witness is falsely implicating the appellant.

19. The prosecution also examined P.W. 6 Ramubhai Gambhirsinh at Exh. 26 who is panch witness of arrest of the appellant and discovery of the weapon spear. The defence has failed to demonstrate that the evidence of the panch witness is not reliable. Panchnama Exh. 36 indicates that blood stained spear was discovered at the instance of the appellant.

20. The prosecution examined P.W. 11 Jayantibhai Manilal Suthar at Exh.45 who had carried out investigation of the case. The deposition of the witness indicates that investigation was carried out properly. The defence has not been able to

demonstrate that the investigation was made with bias or with some other oblique motive.

21. In view the evidence, it is established that the muddamal weapon spear used in commission of the offence was discovered at the instance of the appellant and it contained the blood stain marks. It was sent to F.S.L. for necessary examination. It is true that F.S.L. Report Exh. 47 indicates that the blood group was not identifiable but simply because the blood group was not identifiable, it cannot be said that the weapon was not used in commission of the offence. The inquest panchnama Exh. 25 and P.M. Notes Exh.43 indicate the external injuries found on the dead body. F.S.L. Report Exh. 53 also indicates that cut marks found on the shirt of the deceased were possible by muddamal spear. In view of this evidence, it is difficult to accept that the muddamal weapon spear was not used in commission of the offence. Hence, in our view, the prosecution has proved beyond reasonable doubt that the muddamal weapon spear was used by the appellant in commission of offence.

22. It is contended by the learned advocate for the appellant that the complaint mentions that all three accused inflicted fatal blows to the deceased. Whereas the oral depositions of the witnesses indicate role attributed by each accused, which is improvement in the version of the witnesses and therefore benefit of doubt should be given to the

appellant with regard to commission of cognizable offence. In the present case, the informant gave information about commission of cognisable offence. The information contained all the details like name of the persons involved, weapons and role attributed by them. In the oral depositions the same is reiterated. Oral depositions of the witnesses gave details of the role played by each of the assailants. Therefore, it cannot be said that it was improvement. Hence, in our view, it cannot be said that the prosecution case is not believable as there are improvements in the oral depositions of the witnesses.

23. One more contention raised by the appellant is that there is change in the place of incident. The prosecution did not produce the map of the place of incident. Therefore, whether there is change of place of offence has to be gathered from the oral deposition of P.W. 1 Jayeshbhai, P.W. 2 Ajitbhai and P.W. 4 Navinbhai. Learned advocate for the appellant failed to point out from the evidence that there is change in place of commission of offence. Therefore, submission in that regard cannot be accepted.

24. It is also contended that no blood stains were found on the clothes of the appellant and hence prosecution case becomes improbable. In our view, it is not always necessary that blood stains would be found on the clothes of the assailant. It appears from the panchanama of muddamal spear that the

muddamal spear had 155 cms long wooden handle. It also appears from the depositions of the witnesses that the blow was inflicted when the victim fell down. Therefore, looking to the length of the muddamal spear, it is possible that the clothes of the assailant would not be blood stained. Simply because no blood stains are found on the clothes of the appellant, it cannot be said that the appellant was not involved in commission of the offence.

25. On reappreciation of evidence, in our view, the prosecution has proved beyond reasonable doubt charge levelled against the appellant for the offence punishable u/s 302 of the I.P. Code Therefore, judgment and order of conviction passed by the trial Court in that regard does not require any interference by this Court.

26. As regards the conviction recorded by the trial court for the offence punishable u/s 135 of the Bombay Police Act, it appears that the learned trial Judge has not assigned any reason or ground for such conviction. Record and proceedings of the case do not indicate that any such notification prohibiting the carrying of specified weapons under the provisions of the Bombay Police Act was published and at the time of the incident it was in force prohibiting use of such weapons. In absence of any such notification, the conviction recorded by the trial court for the offence punishable u/s 135 of the

Bombay Police Act cannot be sustained, and therefore, the same is required to be set aside.

27. Learned advocate for the appellant submitted that conviction recorded by the trial Court against the appellant for the offence punishable u/s 302 of the I.P, Code be altered u/s 304 Part-I or Part-II of the I.P. Code. We are unable to accept this submission as the ground pleaded is not a ground to alter the conviction of life imprisonment awarded by the trial court. In order to avail of the benefit of exception to Section 300 of the I.P. Code, the accused is required to point out that the offence was committed in circumstances indicated therein under grave and sudden provocation. Learned advocate for the appellant has failed to point out any such circumstances and therefore this submission made by the learned advocate for the appellant cannot be accepted.

28. For the foregoing reasons, the present appeal is partly allowed and the judgment and order of conviction dated 5-11-1998 passed by the learned Additional Sessions Judge, Ahmedabad (Rural), Mirzapur, Ahmedabad in Sessions Case No. 93 of 1996 against the appellant- **PRAKASH KANTIBHAI VASAVA for life imprisonment** is confirmed to the extent of conviction for the offence punishable u/s 302 of the I.P.Code and it is set aside so far as the offence punishable u/s 135 of the Bombay Police Act is concerned.

(A.L. Dave, J.)

(Bankim N. Mehta,J.)

/JVSatwara/